Supreme Court, U.S.
FILED

96 462 SEP 23 1996

No. ____

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In The Supreme Court of the United States

October Term, 1996

KGET-TV Channel 17, KERO-TV Channel 23, KBAK-TV Channel 29, The Bakersfield Californian and Buck Owens Production Company, Inc. dba KUZZ-FM,

Petitioners,

v.

Superior Court of the State of California for the County of Kern, People of the State of California and Offord Lee Rollins IV,

Respondents.

Petition for Writ of Certiorari to the California Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the public's First Amendment right of access to criminal trials extend to written questionnaires used in jury selection, and if so, what standard applies when the public's right of access to such jury questionnaires conflicts with the right to privacy of prospective jurors?

2. Must a defendant, in seeking to restrict access to criminal proceedings, demonstrate that public access would create a "substantial probability" of prejudice to his right to a fair trial, or does the lesser standard of "reasonable likelihood" suffice?

LIST OF PARTIES TO PROCEEDING BELOW

The following is a list of all parties in the court below. Please note that none of the parties have subsidiaries other than wholly owned subsidiaries.

Offord Lee Rollins IV

The People of the State of California

Superior Court of California, Kern County

KGET-TV Channel 17 (parent company, Ackerley Communications)

KERO-TV Channel 23 (parent companies, McGraw-Hill Broadcasting, McGraw-Hill Companies)

KBAK-TV Channel 29 (parent company, Westwind Communications, LLC)

The Bakersfield Californian

Buck Owens Production Company, Inc., dba KUZZ-FM

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DECISIONS BELOW

The decisions of the Kern County Superior Court are neither officially nor unofficially reported. The decision of the Fifth District Court of Appeal, denying Petitioner's request for extraordinary relief, is also not reported. The decision of the California Supreme Court, denying Petitioners' request for review, is not officially reported, but is unofficially reported at 1996 Cal. LEXIS 3597.

JURISDICTION

The date judgment was entered in the California Supreme Court, denying Petitioners' request for review, is June 25, 1996.

The United States Supreme Court has subject matter jurisdiction of this action by virtue of 28 U.S.C. § 1257.

APPLICABLE LAW

The full text of the First Amendment to the Constitution of the United States, and of Section 237 of the California Code of Civil Procedure, are set forth in the Appendix.

STATEMENT OF THE CASE

This petition seeks review of trial court proceedings that are not, at present, the subject of a pending appeal. As of the date of this petition for writ of certiorari, the criminal trial in the underlying matter of *People* v. *Rollins* has resulted in a hung jury, and a decision whether or not to re-try the case has not yet been made. At the time that the issues presented herein first arose, however, *People* v. *Rollins* was in its pretrial phase, with motions in limine being heard and jury selection proceeding. Accordingly, the facts set forth herein are given in the present tense, to reflect the posture of the case at the time the issues first arose.

Petitioners are members of the news media in Kern County seeking to enforce the public's and media's rights

of access to *People* v. *Rollins*, the underlying criminal proceeding. Petitioners include The Bakersfield Californian, a daily morning newspaper of general circulation; television stations KGET-TV Channel 17, KERO-TV Channel 23, and KBAK-TV Channel 29; and a radio station, Buck Owens Production Company, Inc., dba KUZZ-FM.

Offord Lee Rollins IV ("Rollins") is a former local star athlete convicted in 1992 of the August 1, 1991, shooting death of his former girlfriend, Maria Madera Rodriguez, age 17. His conviction was set aside in May 1995 by the Court of Appeal for the Fifth District of California due to juror misconduct. Rollins, who was 17 years old at the time of the murder, had been tried as an adult but, because of his youth and clean prior record, was sentenced to the California Youth Authority until his 25th birthday. Rollins has maintained his innocence throughout, and the second trial presents hot-button issues of race, celebrity and cross-cultural relationships, among other things.

The Rollins case has attracted considerable local, regional and national attention and received significant media coverage. The first trial received attention from print and broadcast media which was thorough, balanced, diverse, and fair.

After the conviction in the first trial was vacated, the District Attorney decided to re-prosecute Rollins. Because any sentence imposed on Rollins in the retrial would be limited by law to his prior sentence (to the California Youth Authority until his 25th birthday), Rollins would serve less than two years even if convicted. In light of limited public resources, the District Attorney's decision to re-try Rollins has been subject to criticism. In that sense, the second trial taps public interest not only in guilt or innocence of Rollins but also, to some extent, in the judgment of the District Attorney's office.

The matter was ultimately placed on the Kern County Superior Court's trailing docket for May 1996. Prior to pretrial proceedings, defense counsel filed an estimated 57 motions in limine. The existence and substance of these documents were summarily sealed by the court.

Petitioners, however, learned of their existence and requested access to them, specifically requesting, through counsel, access to those motions that concerned public and media access. The court responded to this request by releasing copies of three motions filed by Rollins seeking, among other things, to deny public access entirely to all documents and proceedings involving pretrial motions and jury selection. The court also released the People's reply brief to one of these motions, concurring with closure. Petitioners were denied access to all other pretrial motions filed, or even a list of them.

Petitioners immediately filed written oppositions to all three motions to exclude on grounds of the First Amendment right of access to criminal proceedings, and hearing was held on May 17, 1996. The court issued a closure order on May 22, 1996 (the "Closure Order"). Among other things, the Closure Order denied media access to pretrial proceedings conducted to determine the admissibility of any evidence at the time of trial. In ordering closure, the court stated:

> " . . . the judge need only be satisfied that there is a *reasonable likelihood* of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. [Citations]" *Rosato* v. *Superior Court*, 51 Cal.App.3d 190. [Emphasis added.]

Petitioners timely and properly took exception to this ruling on the basis that the Closure Order applied an improper standard for balancing the right of access against the right to fair trial and the right to privacy. The court applied a standard of "reasonable likelihood" of prejudice,

and not "substantial probability." Moreover, the Closure Order did not contain specific findings to justify a denial of the right of access and did not consider reasonable alternatives to closure.

The Closure Order by its terms barred the media, but not the general public, from attending hearings on those motions regarding the admissibility of evidence. Thereafter, Petitioners protested that it was unconstitutional to exclude the media from a hearing otherwise open to the public. The court responded by closing all hearings on all motions to the entire public.

The Closure Order also initially provided that jury selection would be held in public, though without the presence of cameras and recording devices. Accordingly, on June 3, 1996, the first day of jury selection, Petitioners requested copies of the questionnaires that had been distributed to the prospective jurors. The court summarily denied access to any questionnaires (whether completed or in blank) and ordered them sealed.

Petitioners immediately arranged a hearing with the court on June 4, 1996, to argue for access based on the First Amendment right of access. At hearing, the court refused to apply a constitutional analysis and stated that California Code of Civil Procedure section 237 governed the jury questionnaires, completed or otherwise. That statute, according to the court, requires an affirmative showing of good cause to justify release of juror information, and Petitioners had made no such showing. Accordingly, the court sealed all questionnaires, both completed and in blank.

In the course of the hearing, the court indicated that it had advised the jury panel members, before they completed the questionnaires, that all answers would be strictly confidential.

There was no written order issued, but the court's bench ruling is contained in the transcript of hearing:

> ". . . the information contained in the questionnaire, both the blank questionnaire as well as the answers to the questionnaire, is to remain confidential and will be sealed as required by California statute, I believe it's 237, in the sense that it has identifying information contained within it that can be used to identify individual jurors. . . . And without an appropriate motion brought under that section, good cause showing, Number 1, it's to be sealed." (Appendix D)

> "It is my intention, and still is unless I get directed from some other source that's higher than I, to collect all of the questionnaires and have them sealed pursuant to court order to the extent that they maintain confidential information. . . . Those also have to be collected and sealed and are not to be released without a motion for good cause showing." (Hon. Jerold L. Turner, June 4, 1996 (Appendix D)

Petitioners immediately petitioned to the Court of Appeal for the Fifth District of California seeking extraordinary relief by writ, which was summarily denied by order dated June 7, 1996. Petitioners then immediately petitioned to the California Supreme Court for review of the Court of Appeal's denial, which was summarily denied. This petition followed.

The Rollins trial was still in its preliminary pretrial stages when the orders were entered and this petition process initiated. The court was scheduled to resume on Monday, June 10, 1996, with several pretrial motions being heard and others remaining. The court was also in the preliminary stages of narrowing the jury pool for jury selection. Beginning Tuesday, June 4, panels had been brought in by groups of approximately 45, asked to complete lengthy and detailed questionnaires, and individually questioned for hardship. No panel member had yet been called to the box, and no juror had yet been selected. Those panel members not discharged had been asked to return Tuesday, June 11, 1996.

As of the date of this petition, and despite the hung jury, the court continues to deny access to the jury questionnaires, whether completed or in blank, and continues to deny access to any information as to the existence, substance, and resolution of defense counsel's various motions in limine.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

> "People in open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." (*Press-Enterprise Co.* v. *Superior Court of California, Riverside Co.*, 478 U.S. 1 (1986).)

The case below, *People* v. *Rollins*, is and was a criminal trial of great public interest and importance in the Bakersfield, California area. Petitioners herein accordingly requested access on First Amendment grounds to various stages of the pretrial proceedings, but those requests were denied by the trial court.

Petitioners sought extraordinary relief from the Court of Appeal for the Fifth District of California and then to the California Supreme Court, but each declined review. Petitioners now request review by the Supreme Court.

Petitioners submit that the issues presented involve a classic tension between fundamental constitutional rights that plays out every day in criminal courts across the nation. Unfortunately, these conflicts are being resolved in an uneven, almost ad hoc fashion, doing a grave disservice to the criminal justice system, the people, the news media and the public.

II. THE COURT SHOULD GRANT REVIEW TO ESTABLISH WHEN, IF AT ALL, A COURT IN A CRIMINAL TRIAL MAY RESTRICT THE PUBLIC'S RIGHT OF ACCESS TO JURY VOIR DIRE QUESTIONNAIRES ON GROUNDS OF THE PROSPECTIVE JURORS' RIGHT TO PRIVACY.

State trial courts are in desperate need of guidance in determining what procedure to follow in conducting voir dire, including jury questionnaires, in criminal cases. This petition for review presents a case in point. The trial court below expressly declined to balance the constitutional rights at stake, instead applying a California statute to deny public access to written jury questionnaires.

There has been a dramatic increase in this country in the use of written questionnaires as an adjunct to oral voir dire in criminal cases. This movement has been spawned, among other reasons, in part due to a desire for efficiency, because written questionnaires are a more expedient way to gather information; and in part due to a desire for juror confidentiality, because it is easier to keep written questionnaires from the public.

This proliferatiion of voir dire by questionnaire is traceable to state and federal legislation that renders information about prospective jurors confidential. Petitioners have conducted a preliminary search of such confidentiality statutes, and have unearthed a significant number of such statutes. The survey that follows is by no means comprehensive, but merely identifies those statutes that were easiest to locate by electronic search. Notably, the constitutionality of most of these statutes has yet to be addressed by reported decision.

One group of statutes specifically provides that information obtained by jury questionnaire is confidential, and cannot be disclosed for any purpose, except on an affirmative showing—usually "good cause"—by a person seeking access. The California statute at issue herein, Cal. Code Civ. Proc. § 237 (Deering 1996), falls within this cate-

gory. Other states with similar statutes include Connecticut (Conn. Gen. Stat. § 51-232 (1994) [specifically rendering confidential a "juror questionnaire, including questions eliciting information usually raised in voir dire examination"); Massachusetts (Mass. Gen.. L. ch. 234A, § 22 (1996) [specifically rendering confidential "such information as is ordinarily raised in voir dire examinations of jurors," and requiring a notice of confidentiality to appear "prominently on the face of the questionnaire"]); New York (N.Y. Jud. Law § 509 (Consol. 1996)); and Arizona (Ariz. St. R.C.R.P. Rule 18.3 (1996)).

A second group of statutes provides that information obtained by jury questionnaire can be made public in the discretion of the court. States with statutes in this class include Kentucky (Ky. Rules, AP Part II, § 7 (1994)); Maine (Me. Rev. Stat. Ann. tit. 14, § 1254-A (West 1995)); North Dakota (N.D. Cent. Code § 27-09.1-09 (1995)); Maryland (Md. Code Ann., Cts. & Jud. Proc. § 8-202 (1995)); and Minnesota (Minn. Gen. Prac. Rule 814 (1995)).

Notably, some state and federal courts by local rule have also required confidentiality of questionnaires on a showing of good cause. (See, e.g., Local Rules of Practice and Procedure, U.S. District Court for the Western District of Michigan, Rule 34.)

Notwithstanding the designs of the legislatures, however, the conduct of voir dire by confidential written questionnaire is squarely contrary to established United States Supreme Court precedent, which specifically requires that the public have unrestricted access to jury selection, except in extreme circumstances based on detailed factual findings. Nonetheless, in jurisdictions around the country, including the case below, courts are relying on such confidentiality statutes to bypass the required constitutional analysis.

Petitioners respectfully submit that this petition provides the perfect opportunity for deciding the important

issues presented and reconciling the conflict in the lower courts. Accordingly, Petitioners respectfully request that review be granted on this point.

A. California Has Decided an Important Federal Question in a Way That Conflicts With Relevant Decisions of Other Courts, Including the United States Supreme Court.

Twelve years ago, the United States Supreme Court unequivocally held that the public's constitutional right of access extends to jury voir dire examination in a criminal trial. (*Press-Enterprise Co.* v. *Superior Court of California, Riverside Co.*, 464 U.S. 501 (1984) (hereinafter "*Press-Enterprise I*"). Accordingly, as with all other aspects of a criminal proceeding, public access is presumed, and jury selection cannot be closed unless specific, on the record findings are made demonstrating that closure is "essential" to preserve higher values and is "narrowly tailored" to serve that interest. (*Id.* at 510.)

Moreover, the trial court must articulate the overriding interest "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Id.*) Having made specific findings, the court must still consider alternatives to denying access. (*Id.*)

The privacy of prospective jurors may serve as a compelling interest, but only where an individual panel member specifically raises a privacy concern. A closed session in the interest of protecting juror privacy can be held only after a prospective juror makes an affirmative request for one. (*Id.*, 464 U.S. at 512.)

The *Press-Enterprise I* decision did not address the use of written questionnaires as an adjunct to oral voir dire. As a threshhold matter, it appears to be an open question whether a constitutional right of access attaches to jury questionnaires. Two California appellate courts have held that it does. (*Copley Press, Inc.* v. *Superior Court*, 228 Cal.App.3d 77 (1991), *cert. denied*, 116 L.Ed.2d 247,

112 S.Ct. 304 (hereinafter "*Copley*"); *Lesher Communications, Inc.* v. *Superior Court,* 224 Cal.App.3d 774 (1990).) As detailed below, several other courts have also applied a right of access to jury questionnaires, but have deviated from the strict requirements of *Press-Enterprise I* in doing so.

The highest court of New York, however, has held that information obtained by written jury questionnaires are not subject to the First Amendment right of access on the theory that the questionnaires are not "judicial proceedings" to which the right attaches. (*Newsday, Inc.* v. *Sise,* 518 N.E.2d 930, 933 (1987).)

Petitioners respectfully submit that this Court should grant review to resolve the fundamental constitutional rights at stake, particularly in light of the increasing use of questionnaires as an adjunct to oral voir dire. The decisions of the California courts in the case below are at odds with decisions from other state and federal jurisdictions. As the summary below attests, those courts that have addressed the issue have each adopted their own analysis, and only a minority of them follow *Press-Enterprise I.*

Accordingly, Petitioners respectfully request that this Court put an end to the startling lack of uniformity that pervades this area of fundamental constitutional rights.

1. ***Courts in California and New York, Including the Trial Court Below, Find No Constitutional Right of Access to Questionnaires and Uphold Statutes Requiring That Questionnaires Be Kept Confidential Except Upon a Showing of Good Cause.***

Section 237 of the California Code of Civil Procedure purports to create substantive and procedural law with respect to the privacy rights of jurors. The Kern County Superior Court in the case below expressly applied this

statute in sealing all jury questionnaires. The court insisted that answers to the questionnaire and the questions themselves were strictly confidential under that statute, absent a showing of good cause, which the court held had not been made by Petitioners. The court expressly declined to apply a constitutional right-of-access analysis. The Fifth District Court of Appeals and the California Supreme Court implicitly approved this decision by denying review.

New York has also declined to apply the *Press-Enterprise I* analysis to information obtained by written questionnaire. As noted, New York's Judiciary Law section 509 requires that written questionnaires be administered to prospective jurors, and that all information obtained be kept confidential. See *Newsday, Inc.* v. *Sise, supra,* 518 N.E.2d at 932-933. Under that statute, confidentiality applies to *"all* information contained in the questionnaires regardless of its nature and the possible effect on privacy or safety interests which disclosure might cause." *Id.* [Emphasis in original.] In *Sise,* the higher court of New York upheld the constitutionality of the statute on the grounds that the right of access does not extend to jury questionnaires.

2. *Courts That Do Find a Right of Access to Questionnaires Have Applied a Less Rigorous Standard Than* Press-Enterprise I, *Restricting Access Despite the Absence of a Panel Member's Request for Privacy.*

Those courts that do apply the right of access to jury questionnaires frequently refuse to follow the strict requirements of *Press-Enterprise I.* Although that decision stated that public access could be closed *only* where a panel member specifically requests privacy, courts frequently restrict access without such a request. In many cases, including in the case below, the trial court has expressly instructed the panel members that their questionnaire answers will remain confidential.

For example, a New York appeals court acknowledged in *Newsday, Inc.* v. *Goodman*, 552 N.Y.S.2d 965 (1990), that the right of access attached to a written questionnaire used to streamline voir dire. Nonetheless, the court upheld the trial court's withholding of certain information in the absence of any specific request.

Likewise, the federal district court for the District of Columbia implicitly found, in *United States* v. *George*, 1992 U.S. Dist. LEXIS 16882, 20 Media L.Rep. 1511 (D.C. Dist. 1992), that the right of access did extend to a written questionnaire. Nonetheless, when the Washington Post requested access to the questionnaire answers, the court's grant of access was made subject to certain redactions. The court specifically acknowledged that it would redact some responses despite the absence of an affirmative request for privacy. 1992 U.S.Dist. LEXIS 16882 at 14-15.

And in the case of *In re The South Carolina Press Association*, 946 F.2d 1037 (4th Cir. 1991), the Fourth Circuit applied *Press-Enterprise I* to a written questionnaire, but upheld the trial court's refusal to release any part of the questionnaire. Noting that its decision was "complicated" by the fact that the trial court had guaranteed confidentiality to the panel members, and frowning on the practice of issuing such promises, the court used that exact circumstance to justify closure. *Id.*, 946 F.2d at 1040, 1042-43.

3. *One Federal Circuit Has Turned the Issue Upside Down, Holding Pursuant to Federal Statute That the Public Is Entitled to the Names and Addresses of Prospective Jurors But Not to Any Other Information Revealed by Questionnaire.*

The unsettled status of jury questionnaires is underscored best by a Fourth Circuit opinion that turns the entire *Press-Enterprise I* analysis on its head. In all the other cases discussed above, the courts have treated the

panel members' *identity* as the information most entitled to privacy, with other information about their backgrounds and beliefs as less private. In the Fourth Circuit opinion, however, the field is reversed: pursuant to federal statute, panel members are not entitled to anonymity, but other information may be kept confidential.

That decision, *In re the Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988), involved a newspaper's request for access to information taken from written questionnaires, including the names, addresses, occupations, and marital status of the panel members. Expressly drawing upon both *Press-Enterprise I* and *Press-Enterprise II*, the court ruled that it must release the names and addresses of the panel members and withhold all other information revealed by questionnaire, even in the absence of any request for privacy by a panel member. In so doing, the court relied on 28 U.S.C. § 1867(f), which protects the contents of records or papers used by the clerk in connection with the jury selection process.

4. *Several Courts Do Apply a Full* Press-Enterprise I *Analysis, Treating Written Questionnaires as the Constitutional Equivalent of Oral Voir Dire.*

In contrast to the approach of the courts described above, the California Court of Appeals for the Fourth District in *Copley* synthesized the balancing test of *Press-Enterprise I* into a bright-line procedure for administering jury questionnaires:

> ". . . the proper approach is to have the superior court advise the venirepersons that they have the right to request in camera hearings on sensitive questions rather than writing their answers in the questionnaire. Counsel should be present and the session should be reported, with the trial court determining afterward on the record whether a legitimate privacy interest warrants protection. If it does, the trial court should then seal the transcript of the hearing. Hence-

> forth, the superior court shall inform the venirepersons of their right to request in camera hearings to answer specific sensitive questions rather than filling out those answers on the questionnaire form. No explicit or implicit promise of confidentiality should be attached to the information contained in the questionnaires; rather the venirepersons shall be expressly informed the questionnaires are public records. Second, the superior court shall provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral voir dire. . . ." (*Copley, supra,* 228 Cal.App.3d at 87.)

The *Copley* court also observed that the names, addresses, and other identifying information "is essential for the determination of juror qualification and management of the jury system, but is not properly part of voir dire, [and] should be kept confidential." *Copley, supra,* 228 Cal.App.3d at 81. It required that this information be segregated from the other questions. *Id.* at 88.

Unlike the other decisions described above, the *Copley* decision appears to be fully consonant with *Press-Enterprise I,* treating written questionnaires as the constitutional equivalent of oral voir dire questions. Petitioners have identified only one other occasion in which *Press-Enterprise I* appears to have been followed without dilution in a jury-questionnaire case. (See *State* v. *Pennell,* 583 A.2d 1348 (Del.Super. 1990).)

B. The Clash of Constitutional Rights in the Context of Jury Questionnaires Presents an Important Federal Question That Has Not Been, But Should Be, Settled by This Court.

When the trial court errs in one direction and unconstitutionally restricts or denies public access to voir dire questionnaires, public access has been irretrievably lost, and public confidence in the ultimate verdict irretrievably damaged. Likewise, if the trial court errs the other way

and impermissibly reveals personal information, privacy has been irrevocably compromised. Either way, there is effectively no relief available. By the time a petition for relief is filed, heard, and ruled upon—assuming arguendo that the petitioner is fortunate enough to avoid summary denial—the entire trial will almost certainly be over.

This conflict has been recurring in trial courts for years, and will certainly continue to do so in the future. Indeed, this conflict takes place virtually every day. If anything, the number of such conflicts will skyrocket, as media outlets continue to proliferate and our information society generates more and more anxiety about individual privacy. The use of written questionnaires as an adjunct to oral voir dire can be expected to increase mightily as trial courts strive to be more efficient.

And with all due respect to the trial courts, the rights of media and prospective jurors are not generally held in high regard by the trial courts. They are not "parties" to the underlying criminal trial, and their interests are generally viewed as secondary to those of prosecution and defense. A trial court faced with 55 motions in limine may devote little time and less interest to weighing a conflict between the rights of the non-party media against the non-party panel member. Jury selection is approached with the singular goal of getting through it with expedience.

The lack of meaningful relief makes it crucial that the Court declare a bright-line rule, or at least a clear balancing test, to guide trial courts in the use of jury questionnaires. In virtually every right of access appellate decision, the first issue decided is whether the court should hear the matter, given that it has become moot. (See, e.g., *Copley, supra*, 228 Cal.App.3rd 77.) There is a chronic and dire need for this Court to intervene in a meaningful manner and resolve this issue, given its widespread application.

III. THE COURT SHOULD GRANT REVIEW TO ESTABLISH WHETHER A DEFENDANT, IN SEEKING TO RESTRICT ACCESS TO CRIMINAL PROCEEDINGS, MUST DEMONSTRATE THAT PUBLIC ACCESS WOULD CREATE A "SUBSTANTIAL PROBABILITY" OF PREJUDICE TO HIS RIGHT TO A FAIR TRIAL, OR WHETHER THE LESSER STANDARD OF "REASONABLE LIKELIHOOD" SUFFICES.

There is considerable confusion in California and elsewhere as to the standard of review when a criminal defendant's right to a fair trial conflicts with the public's right of access to criminal proceedings. Petitioners respectfully submit that this Court should grant review to resolve the issue, once and for all.

A. The Constitutional Standard That Applies In Right-Of-Access Cases Is an Important Federal Question, and California's Use of a "Reasonable Likelihood" of Prejudice Standard Conflicts With Relevant Decisions of Other Courts, Including the United States Supreme Court.

The First Amendment guarantees to the public and media a right of access to criminal proceedings. (*Press-Enterprise I, supra*, 464 U.S. 501.) Accordingly, public access is presumed, and a criminal proceeding cannot be closed unless specific, on the record findings are made demonstrating that closure is "essential" to preserve higher values and is "narrowly tailored" to serve that interest. (*Id.*, 464 U.S. at 510.)

Although the defendant's right to a fair trial is a compelling interest that *may* justify closure, this case presents the question of when the potential prejudice to that interest makes closure "essential." In the case below, this issue arose in the order dated May 22, 1996, which denied public access to the existence and substance of some 55 motions in limine filed by defense counsel. In fashioning the order, the trial court applied the standard that closure

became "essential" when the defendant demonstrated a "reasonable likelihood" of prejudice. That standard was discredited by the United States Supreme Court ten years ago in favor of a "substantial probability" standard, but "reasonable likelihood" continues to enjoy notoriety in California and elsewhere.

Moreover, the court must articulate the overriding interest "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Id.*) Having made specific findings, the court must still consider alternatives to denying access. (*Id.*)

If the Court accepts review of this case, Petitioners will argue that the trial court did not make specific findings adequate to justify denial of access, and those findings that *were* made were without evidentiary support. Nor did the trial court consider the reasonable alternatives available, including careful admonishments and instructions to the jury, postponement of trial, and vigorous voir dire, among other things.

However, the foremost issue to be resolved is whether California can continue to deny public access to criminal proceedings on a showing of "reasonable likelihood" of prejudice to the defendant's right to a fair trial, or whether California must follow the "substantial probability" standard set forth by the United States Supreme Court.

1. *Access Restrictions Are "Essential" to Preserve the Right to a Fair Trial, According to the United States Supreme Court, Only When There Is a "Substantial Probability" of Prejudice.*

Ten years ago, the United States Supreme Court held that the Constitution does not permit any restriction on the public's right of access to criminal proceedings absent a "*substantial probability* that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent . . . ." (*Press-Enterprise Co.* v. *Superior Court*

of California, Riverside County) 478 U.S. 1, 13 (1986) (hereinafter "*Press-Enterprise II*") [Emphasis added].) Specifically rejecting a "reasonable likelihood" standard, the Court stated:

> ". . . the 'reasonable likelihood' test places a lesser burden on the defendant than the 'substantial probability' test which we hold is called for by the First Amendment." (*Id.*)

This decree has been followed by several jurisdictions since its issuance. See, e.g., *In re State-Record Co.*, 917 F.2d 124 (4th Cir. 1990). In practice, however, courts in California and elsewhere continue to apply a test other than "substantial probability," as set forth below.

2. Access Restrictions Are "Essential" to Preserve the Right to a Fair Trial, According to the Trial Court and Other Courts in California, When There Is a "Reasonable Likelihood" of Prejudice.

Notwithstanding the United States Supreme Court, the trial court below and courts in at least two California appellate districts continue to apply the "reasonable likelihood" test. Again, the May 22, 1996, order states in pertinent part:

> " '. . . the judge need only be satisfied that there is a *reasonable likelihood* of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. [Citations]' *Rosato v. Superior Court*, 51 Cal.App.3d 190."

The *Rosato* opinion was issued in 1975, a decade before *Press-Enterprise II* in 1986. Nonetheless, the trial court applied the "reasonable likelihood" test. A survey of recent decisions indicates that this was not an isolated event.

For example, in yet a third case involving the Riverside Press-Enterprise newspaper, *Press-Enterprise* v. *Superior Court*, 22 Cal.App.4th 498 (1994), California's Fourth

District Court of Appeal specifically declined to choose between the "reasonable likelihood" test and the "substantial probability" test. In that case, the Fourth District decided that the facts failed to satisfy either standard. (*Id.*) However, the Fourth District Court of Appeal has since cited with favor the "reasonable likelihood" test. See *KGTV Channel 10* v. *Superior Court*, 26 Cal.App.4th 1673, 1684-1685 (1994).)

California's Fifth District Court of Appeals has also followed "reasonable likelihood" instead of "substantial probability." In addition to the decision of the trial court below, which the Fifth District declined to review, the lesser standard was also applied in the Fifth District case of *Cheyenne K.* v. *Superior Court*, 208 Cal.App.3d 331, 336 (1989).

Clearly, it is intolerable and unjust for the courts of California to continue to apply, *for more than ten years*, a test that has been rejected by the United States Supreme Court.

3. *Courts in Other Jurisdictions Also Continue to Apply a Less Rigorous Standard Than the "Substantial Probability" Standard Required by* Press-Enterprise II.

California is not the only jurisdiction that continues to disregard *Press-Enterprise II*. Jurisdictions in New Jersey, Mississippi, Montana and Ohio have also followed a standard that was less rigorous than "substantial probability."

For example, the court in *State* v. *Halsey*, 526 A.2d 1165 (N.J. Super. 1987), applied a standard of "realistic likelihood." The court in *Mississippi Publishers Corp.* v. *Coleman*, 515 So.2d 1163 (Miss. 1987), applied a hybrid standard of "substantial likelihood."

An unofficial Ninth Circuit decision, *Nichols* v. *Greeley*, 1991 U.S.App. LEXIS 29983 (9th Cir. 1991), employed

a test of whether the publicity created a "significant potential" for prejudice.

The Montana Supreme Court, in *Great Falls Tribune* v. *District Court,* 608 P.2d 116 (Mont. 1980), analyzed the issue as whether the right to a fair trial was "jeopardized" by "substantial prejudicial publicity."

Finally, in Ohio, the test appears to be whether the defendant can show "cause" that outweighs the value of openness. See *State* v. *Huertas,* 553 N.E.2d 1058 (Ohio 1990).

B. There Is a Lack of Uniformity Between the Lower Courts and the United States Supreme Court That Should Be Reconciled.

As the survey above indicates, notwithstanding United States Supreme Court's decision in *Press-Enterprise II* that, to overcome the presumption of access, a defendant must demonstrate a "substantial probability" of prejudice, the standard that continues to be applied in many courts is something less rigorous than that.

There is an inherent tension in a criminal case between public's right of access to the proceedings and the defendant's right to a fair trial. Every day in the nation's courts this tension is at issue, and every day those courts apply a test to determine whether the right to a fair trial overrides the right of access. Incredibly, every day some trial courts apply a standard that is fundamentally inconsistent with *Press-Enterprise II.* Petitioners respectfully submit that this case presents an opportunity to determine, once and for all, whether or not the "substantial probability" standard of *Press-Enterprise II* is binding in California and elsewhere.

As with the conflict between public access and juror privacy, there is no margin for error in balancing public access against a fair trial. When the trial court errs in

one direction and unconstitutionally restricts or denies access, the opportunity for access has been irretrievably lost, and public confidence in the ultimate verdict irretrievably damaged. Likewise, if the trial court errs the other way and unconstitutionally deprives the defendant of a fair trial, the remedy of an appeal is remote at best. Either way, there is no adequate relief available.

Based on the foregoing, Petitioners respectfully submit that this Court should accept review of this case to define, once and for all, the appropriate standard.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this petition be granted on all points raised herein, together with the issues underlying them. The issues raised herein are of vital importance to the day-to-day operation of the nation's criminal justice system, and the lack of clear Supreme Court guidance on these issues to date has resulted in repeated constitutional violations without any effective relief, including, in particular, in the case below.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jun. 25, 1996]

No. 5th FO26139-SO54191

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

KGET-TV, CHANNEL 17, *et al.*,
Petitioners

v.

SUPERIOR COURT, COUNTY OF KERN,
Respondent

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Real Parties in Interest

Application for stay and petition for review DENIED. Mosk, J. is of the opinion the stay should be granted.

GEORGE
Chief Justice

APPENDIX B

[Filed Jun. 7, 1996]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

FO26139
(Kern Sup. Ct. No. 47815A)

KGET-TV, CHANNEL 17, *et al.*,
Petitioners,

v.

SUPERIOR COURT, COUNTY OF KERN,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Real Parties In Interest.

BY THE COURT*:

The "Petition For Writ Of Mandamus, Prohibition, Certiorari Or Such Other Extraordinary Relief . . ." is denied.

Date Jun. 7, 1996

/s/ Martin
Acting P.J.

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* Before Martin, Acting P.J., Vartabedian, J., and Harris, J.

APPENDIX C

[May 22, 1996]

SUPERIOR COURT, BAKERSFIELD
IN AND FOR THE COUNTY OF KERN

Case No. SC047815 A

PEOPLE

vs.

ROLLINS, OFFORD LEE IV

MINUTE ORDER

RULING ON SUBMITTED MATTERS RE MEDIA COVERAGE OF HEARINGS ON MOTION IN LIMINE AND JURY SELECTION

The defendant has moved for an exclusion of all media coverage during hearings on motion in limine and jury selection to guaranty the defendant's right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1 and 7 of the California Constitution.

Defendant contends in essence that "an inordinate amount of media coverage" has occurred in this case to date. The in limine motions presented to the Court address the "admissibility of evidence, including determinations by the court of the existence of preliminary facts" which "precede jury selection." Defendant concludes, "If media coverage is allowed during these proceedings, prospective jurors may be exposed to information which

ultimately may be determined to be inadmissible" and "this may create a substantial danger of denying the defendant a fair trial."

It is abundantly clear from the authorities submitted by all parties that the defendant's right to a fair trial is paramount and supersedes the right to public access.

The Court, in *Allegrezza v. Superior Court,* 47 Cal. App.3d 948, at page 951, succinctly states:

> "The superior court was not obligated to strike a proper balance between the First Amendment right of freedom of the press, and the Fifth Amendment's guaranty of a fair trial. In the context of this case the rights of the press are no greater than the rights of the public generally. And the public generally has no right to pretrial disclosure of questionable evidence, a disclosure which might well deny to the accused the fair and impartial trial which is his due [citations]."

Citing decisions by both the Supreme Courts of the United States and the State of California, the court in *Allegrezza* states:

> " 'Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.*' [Citations]." (Emphasis in original).

Counsel for the media has cited the case of *Press-Enterprise Company v. Superior Court* (1986) 478 U.S. 1, for declaring the right of public access to the preliminary proceedings for which the defendant seeks media exclusion. However, the court in *Oziel v. Superior Court,* 223 Cal.App.3d 1284, at 1296 (citing *Press-Enterprise Com-*

pany v. Superior Court, supra,) determined that even when the right of public access attaches "*it is not absolute.*":

> "While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. [Citation]
>
> . . . in any case, the presumption of public access 'may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' "

The history of this case has fostered overwhelming public interest and public scrutiny with corresponding media coverage, commentary, opinion, and editorial. There is no reason to assume at this point that the wealth of media coverage at any stage of the proceedings hereafter would be any less voracious than it has been to date.

It is not mere speculation that extensive media discussion of the substance of potential evidence which may be excluded from presentation at trial would be read, viewed or opined by members of the public who may be called to jury service in this case, thereby compounding the difficulty in selecting an impartial jury untainted by exposure to prior media coverage. Previous prolific and comprehensive media coverage of this case has already attracted media attention on a national scale. This court does not discount the results that can be achieved with vigorous voir dire to jurors tainted by pretrial publicity. But, court and counsels' efforts in voir dire are not a "cure all." This court must also consider the jury resources available.

It is argued that much of the evidence relating to pretrial evidentiary matters has already been discussed in the appellate opinion, and because the appellate opin-

ion is available to the public, no harm could result from the media's presence at pretrial motions. This Court does not agree. The opinion of the appellate court is not published and, merely because it is available, does not mean that any members of the public except for the unusually curious or seriously interested would, on their own, seek out such information.

It has also been argued that the defendant may seek a change of venue untouched by the extensive publicity rather than requesting limited "in camera" review of the pretrial motions. This argument was summarily dismissed in *Allegrezza v. Superior Court, supra,* at page 952:

> "The Sixth Amendment guarantees to an accused the right to be tried by an 'impartial jury,' drawn from the 'district wherein the crime shall have been committed.' Obviously, the courts should not participate in, or encourage, a procedure which obliges the accused to forfeit one constitutional right in order to retain the protection of another."

"The Superior Court is not obligated to strike a balance between the First Amendment right of freedom of the press and Fifth Amendment's guaranty of a fair trial. (*Allegrezza v. Superior Court, supra.*) "Rather, the judge need only be satisfied that there is a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. [Citations]" *Rosato v. Superior Court,* 51 Cal. App.3d 190.

Accordingly, this Court will prohibit media access to pretrial proceedings conducted to determine the admissibility of any evidence at the time of trial. This does not, however, mean that the Court is limiting media access to all pretrial proceedings in this case. The Court's concern is the immediate and public dissemination of information which the Court may find unreliable, untrustworthy and otherwise inadmissible in trial. Moreover, it

is not this Court's intent to deny this information to the public. The proceedings will be recorded. Access to the information is postponed until the threat to the defendant's fair trial is passed. Moreover, if the Court allows any of the evidence in at the time of trial, that information will certainly be public information at trial.

This ruling is intended to apply only to in limine motions related to the foundation and/or admissibility of evidence. It does not extend to pretrial motions relating to procedural matters or other aspects of the court proceedings. This Court is aware of the unique public interest in the proceedings being conducted before it. It is the intent of this Court that any restrictions imposed on media access and/or coverage of this particular case be limited so as to secure the public's right to overall access of information of these proceedings.

MEDIA ACCESS DURING JURY SELECTION

The Court's concern with media coverage during jury selection is to maintain the integrity and privacy of any potetnial jurors in this case. It is the opinion of the Court that the mechanic's of the selection process, as governed by the applicable statutes requiring confidentiality of juror identification, can be conducted in a manner that would allow limited media access during the jury selection process. The purpose of the jury selection process is to obtain and empanel a fair and impartial jury which will weigh and consider the evidence and reach a jurt verdict regardless of the consequences. In order to accomplish this task, it is necessary that all potential jurors answer questions honestly and without reservation. Many of these questions may seek to elicit information which potential jurors deem to be personal and private. Moreover, this Court is of the opinion that many jurors may provide less than a candid response knowing that their responses will be immediately recorded by cameras and other recording devices.

For this reason, the Court prohibits cameras and recording devices of any kind in the courtroom during jury voir dire.

All other media present during jury voir dire shall adhere to the following guidelines:

1. Members of the media shall not be talking with or within earshot of any member of the jury panel at any time, including but not limited to the times when jurors are entering and/or leaving the courtroom.

2. Television cameras and/or still cameras shall not photograph any members of the jury panel at any time even upon leaving the courtroom and the court building.

3. Should any juror request that his or her answers be given without media present, the court shall honor that request and conduct questioning "in camera."

OTHER PRETRIAL PROCEEDINGS (NOT INCLUDING EVIDENTIARY/FOUNDATIONAL MOTIONS OR JURY SELECTION)

The electronic media may be present.

The following guidelines shall apply:

1. Television cameras shall not be directed at anyone seated in the spectator section of the courtroom.

2. Radio reporters and newspaper reporters shall not pick up their equipment and/or leave the courtroom while the court is in session.

3. Members of the media shall not talk amongst themselves or with any other persons during such time as the court is in session.

MEDIA COVERAGE DURING TRIAL

The following guidelines shall apply:

1. Subpect to No. 8 below, there are no restrictions on coverage in opening statements.

2. Subject to No. 8 below, there are no restrictions with regard to closing arguments.

3. Subject to No. 8 below, during the evidentiary phase, the following restrictions will apply:

a. Only one television camera will be permitted.

b. Coverage of the evidentiary phase will be permitted only on the condition that the camera and operator are present for each session.

c. Coverage of the evidentiary phase will be permitted only on the condition that local television stations agree with regard to terms and conditions for pool coverage.

4. Television cameras shall not photograph any of the members of the jury at any time.

5. Television cameras during the evidentiary phase of the trial shall not be directed at anyone seated in the spectator section of the courtroom.

6. Radio reporters and newspaper photographers shall not pick up their equipment and/or leave the courtroom while the court is in session.

7. Members of the media shall not be talking with or within earshot of any member of the jury at any time, including but not limited to the times when the jurors are entering and/or leaving the courtroom.

8. No members of the media shall contact any member of the court staff for any reason except for the purpose of requesting a court order allowing coverage of the immediate proceedings.

PROTECTIVE ORDER

In order to facilitate the foregoing orders, it is the opinion of the Court that a limited protective order is necessary.

Until such time as the evidentiary and/or foundational motions in limine, and jury selection, are concluded, no

witness or person subpoenaed as a witness, no judicial officer, public employee, peace officer, or attorney connected with this case or any of their staff shall make or authorize for public dissemination any extra judicial statements concerning this case and no such person shall release or authorize the release of any documents, exhibits or other evidence connected with this case. This order does not apply to comments regarding purely procedural matters such as the estimated length of the hearing, or the names of the witnesess who are expected to testify on a particular date.

Absolutely no comment is to be made regarding an opinion as to guilt or innocence of the defendant or the quality of any evidence presented.

If the need for a further protective order is needed thereafter, the Court will revisit and consider such a request at that time.

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

Department 14 Hon. JEROLD L. TURNER, JUDGE

Case No. 47815

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

OFFORD ROLLINS, IV,
Defendant.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

JUNE 4, 1996

[2] THE COURT: Record will reflect that we are in session in the matter of People versus Offord Rollins, IV. 47815. The defendant is present with counsel, Mr. Sala, and Mr. Tauzer is here present for the People. Counsel, did you get notice of the ex parte at 1:15 today?

MR. TAUZER: Yes.

THE COURT: Mr. Sala?

MR. SALA: Yes, I did, your Honor. However, I have a request. I am scheduled to see a doctor at 12 noon and I was anticipating being back at 1:30. If we could perhaps ask that that be trailed to 1:30. I should be

back. If I can be back by 1:15, I certainly will. They are supposed to get me in at noon.

THE COURT: All right. Mr. Sala, I'll trail it till you are back. I anticipate the request is to release the questionnaire.

MR. SALA: Yes.

THE COURT: We will see how that works out on an ex parte basis.

Anything further, counsel, before I send over for the next jury panel?

MR. TAUZER: No, your Honor.

[3] MR. SALA: No, your Honor.

(Whereupon jury voir dire took place.)

* * * *

[13] THE COURT: The record will reflect that we are in session in the matter of Offord Lee Rollins. Case Number 47815. Defendant is present with counsel, Mr. Sala. Mr. Tauzer is here for the People.

MR. TAUZER: Yes.

THE COURT: And Mr. Martin, you are here for an ex parte request at this time?

MR. MARTIN: Yes, I am, your Honor. For the record, my name is George Martin and I'm here representing the Bakersfield California, et al., to request the court or maybe to clarify the procedure the court's undertaken.

It is my understanding that the press has not been given copies of the voir dire questions of the actual questionnaire and that they were not going to be given copies of the answers to the questionnaire which we would, if that is the court's thinking and I didn't get that out of the original order, that's what I've kind of picked up from my clients, we would request that the court modify that and follow the directives of Copley Press versus Superior Court which we have cited in our points and authorities which calls for the voir dire questionnaire to be given to the press once a juror [14] is seated in the box and that's essentially our position, your Honor.

THE COURT: Mr. Martin, you understand that we have no jurors seated in the box at this point in time?

MR. MARTIN: That's correct, your Honor.

THE COURT: The ruling in this particular regard, my understanding is that the information contained in the questionnaire, both the blank questionnaire as well as the answers to the questionnaire, is to remain confidential and will be sealed as required by California statute, I believe it's 237, in the sense that it has identifying information contained within it that can be used to identify individual jurors. And without an appropriate motion brought under that section, good cause showing, Number 1, it's to be sealed.

The other circumstances for not disclosing the questionnaire prior to the questioning or filling out by the jurors is that the court and counsel are entitled to have spontaneous answers to these questions and the right to the spontaneous answers of what we feel to be answers of first impression by the prospective jurors without waiving a disclosure of even the blank questionnaire at this particular time. Those are basically the fundamental bases for the ruling.

With regard to the presence of unrecorded [15] media or the nonrecorded media during the jury session, one of my considerations in this particular regard in allowing media to be present during voir dire questioning at all was the procedure that we are employing to maintain the confidentiality of the individual jurors by using an identification system of numbers as opposed to names. And Number 2, we had anticipated that the material and answers contained within the questionnaire would be privileged, that the—and with the option of the juror requesting that any sensitive areas be covered in oral voir dire in-camera, that those circumstances with regard to confidentiality and privacy matters could be maintained. And that essentially is the fundamental basis upon the ruling and the media's access to jury voir dire at all in this particular case. But you want the interpretation of my ruling, that's what I'm giving.

MR. MARTIN: So your Honor, if I should—I understand it so we could take whatever appropriate action we believe necessary, his Honor is not following Copley Press versus Superior Court as far as instructing the jury not to include any information on the questionnaire that they feel sensitive or would invade their privacy or embarrass them?

THE COURT: You mean I am not or I am?

MR. MARTIN: I'm trying to figure out what [16] we are doing because under Copley, most of the concerns your Honor has just addressed would be resolved because the jurors are instructed or are to be instructed that the questionnaires are not confidential and not to include anything in there that would be—they feel would be embarrassing. The court would take up that issue with them individually.

THE COURT: That is an instruction within the voir dire package in and of itself. However, there is information requested in the scope of the questions that are being asked that is included within this questionnaire, and we have done this to facilitate and try to expedite the jury selection process, Mr. Martin.

There is confidential information and information of necessarily a private nature that are asked in the questions based upon the circumstances of this particular case.

One of those things in order for us to facilitate and manage the questionnaire itself happens to be identifying information relating to these specific jurors.

It is my intention, and still is unless I get directed from some other source that's higher than I, to collect all of the questionnaires and have them sealed pursuant to court order to the extent that they maintain confidential information. [17] That is as an interpretation of what I read from an opinion or directive, better than an opinion, that I felt from Chief Justice Ardais that extended to even notes written by the jurors who are in deliberation, that those notes have to be sealed, that they have any identification such as the jurors'—the foreman's name signing

that note. Those also have to be collected and sealed and are not to be released without a motion with good cause showing. That is basically the nature of the circumstances on one of the fundamental bases for this order.

MR. MARTIN: I thank the court for explaining the rationale probably more than most judges would do and I appreciate that. We will go back and look at whether or not we want to file a motion or, rather, this is just something that we should take up.

Most of those issues constitutionally were addressed in Copley. For instance, names, driver's license, Social Security, identification of individual jurors was to be separated from the questionnaire and then the questionnaire turned over as soon as the juror was put in the box. No questionnaires by jurors who were not called and seated in the box would be turned over at all for anything.

With that limited amount, as I read the case law, I Shepardized it, I don't know of any [18] cases that supercede it, that's what's required of the court under the Constitution. But we will, with our understanding of the judge's rationale, go back and take a look at it and either venture back here or someplace else.

THE COURT: It is still my intention at this point, unless I am directed to disclose, I'm telling the jurors at this particular case, Mr. Martin, that the answers that they have been putting in these questionnaires are to remain confidential. If there is anything that they do not want to discuss, they may request the response not be discussed openly in the court with other persons present. We can go in in-camera and have that discussion.

But if you are telling me now that these jurors cannot ask or answer these questions and we cannot have their true feelings, their true emotions expressed because of what they deem to be or desirous to remain confidential except for the persons present during these particular proceedings, such as the prosecuting attorney, defense attorney and the defendant, then we may have to start all over again.

MR. MARTIN: Well, my reading, your Honor, of the Copley case says that—cautions the trial court from giving such instruction that the questionnaire will be confidential. As a matter of [19] fact, it states that the trial court should not make such an instruction to the jury. That's my reading of it.

THE COURT: Even with regard to identifying information?

MR. MARTIN: It has—let me see if I can find the appropriate—what my understanding, to sum it up, what the court in Copley said and it was looking perspective to other courts—

THE COURT: What was the date of the Copley decision?

MR. MARTIN: February 1991.

THE COURT: You understand the law with regard to confidentiality is effective as of 1-1-96?

MR. MARTIN: I understand, your Honor, but it doesn't supercede the Constitution and the grounds in the February 1991 Copley Press versus Superior Court case was not based on statutory. As a matter of fact, there is a discussion, I think it was Prop. 115 and basic constitutional law, it does not supercede the Constitution as long as the cases are based on constitutional law. Going back to the Riverside case and so forth, the statute if it was in conflict with the Constitution would be void. And that's our position. Another court, higher court might find differently.

THE COURT: Give me your Copley citation just as a matter of expediency.

[20] MR. MARTIN: It's in our moving papers, but let me give you—

THE COURT: I understand it's in your moving papers, but I have those at a different location right at the moment.

MR. MARTIN: Let me give you two cases I think are instructive. Lesher, L-e-s-h-e-r, Communications, Inc. versus Superior Court and that's 224 Cal.App.3d 774.

That's an October 1990 case that came out of the First District, Division 4.

And then the case I have been discussing the most with the court here was Copley Press, Inc. versus Superior Court. That's 228 Cal.App.3d 77. That's a February 1991 case which is an amended opinion because of some split of authority. The Supreme Court remanded back the Copley case for further consideration in light of the Lesher Communications case. Copley comes out of the Fourth District, Division 1.

And basically the difference between those two cases wasn't the right of the public to have access to the questionnaire under the Constitution or the answers to the questionnaire, but whether or not the public could have the answers to all questionnaires that were filled out even if the juror wasn't seated in the box, never been put in the box. And the remanded case allowed conformity [21] between those two cases.

The Copley case then agreed with the Lesher case that, yes, jurors who filled out confidential information or questionnaire that weren't put in the box should not have that information disclosed. Serves no purpose. But for those that are seated, once they are in the box, it says that information shall be turned over to the media.

THE COURT: We are talking about 12 jurors that are ultimately seated; is that correct?

MR. MARTIN: I'm sorry, your Honor?

THE COURT: Are we talking about the 12 jurors that are ultimately seated?

MR. MARTIN: No. Once they are called and voir dire begins on the—according to the case, on the filling out of the questionnaire, because that was one issue, is the questionnaire part of the voir dire, the court said yes, it is. It was filled out and turned in, voir dire is commenced. But you don't have to turn over the questionnaire until the juror is actually called in the box and questioning starts of the juror. Once they are called,

then as I read the case, then the questionnaire is subject to the media's right to obtain it.

THE COURT: Comments, Mr. Tauzer?

MR. TAUZER: I don't really have any, your Honor. I'm in agreeemnt—I haven't analyzed the [22] cases, but I am in agreement with the court's ruling insofar as it seems like things have changed substantially with the new legislation and the privacy rights of jurors that probably puts a whole new light on these cases. But without having analyzed them, I'm not positive.

THE COURT: Mr. Sala?

MR. SALA: Your Honor, I think this is a first, at least in the time I've been practicing, where we can all agree, prosecutor and defense and the court, that the measures that the court is taking is appropriate in particular to protect not only the right to a fair trial of Mr. Rollins, but a right that the People have to a fair trial as well. And that is to ensure that the answers provided are given in an atmosphere that would generate spontaneity, honesty, truthfulness.

I submit that the court under the decisions I've previously cited in the various motions that I had filed with the court, I believe one of them is a decision out of the Fifth District Court of Appeal, the Rosato, R-o-s-a-t-o, provides the court with a great degree of discretion in determining what procedures should be employed in protecting the rights of the accused and People to a fair trial.

And in the sense of—although I understand the media's desire to have this [23] questionnaire, they certainly have an interest in pursuing that and it is secondary to preserving the or, rather, maximizing the potential to receive a fair trial, particularly in this case where we have had wide-spread publicity and, in fact, we saw some of that publicity in the newspaper yesterday to the extent that it was reported in the Bakersfield Californian as to the proceedings that transpired during voir dire. I'll submit it.

THE COURT: Final comments?

MR. MARTIN: Yes, your Honor. Our—I guess the final upshot of this is that we have Shepardized these cases and at least from a common-law approach and a constitutional approach as opposed to statutory approach, they are the law.

As far as I can read, we are talking about the public's right to know what's going on in a public trial under the U.S. Constitution, and I understand that his Honor has to delicately balance those conflicting interests.

We don't believe the order as is now structured specifies—it's overbroad, does not specify what questions would cause embarrassment, what questions would lead to the substantial probability of miscarriage of justice, which I understand is the test. And for that reason, I would urge the court to review Copley to see whether or not we are following the directive of the Court [24] of Appeals. Thank you, your Honor.

THE COURT: Well, with regard to maintaining the confidentiality, I feel that I'm following a specific directive issued by Chief Justice Ardais—

MR. MARTIN: I understand, your Honor.

THE COURT: —with regard to confidentiality.

The dilemma I have here is the prosecutor represents the People of the State of California who has indicated a degree or desire at this particular point in time on the part of the, quote, unquote, public who he ostensibly represents to maintain a certain degree of confidentiality with regard to these questionnaires, specifically because we want spontaneous, we want honest answers and we are delving into some very sensitive subjects which people tend to find personal and private. The defendant also has a paramount right above all other rights with regard to a right to a fair trial. That, I believe, is gleaned from the cases that I've also Shepardized that were in my original page decision with regard to media coverage of this trial.

Thirdly, and I think most importantly, we forget sometimes, I guess, that jurors are, in fact, themselves the pub-

lic who are asked to do a public service. They too, have a competing right to [25] privacy with regard to certain things that may be queried of them during voir dire.

That right even allows, if they request it, that none of the questioning occur in a public forum or where other public is allowed such as an in-camera proceeding.

Those are the competing rights that I had sought to balance with the aspect of the new law related to confidentiality of juries and jury list and any identifying information relating to individual jurors that is effective as of January 1, 1996.

I believe that the Legislature is trying to weigh or at least emphasize the right of privacy of jurors, especially in cases that have, and I think it's in direct response to cases that have been sensationalized or cases where great retribution is feared in certain circumstances.

Whatever it be, it is in fact the law and I am attempting to comply and balance all of these competing rights, but some rights notwithstanding have to give way.

Yes, it is true I believe that the media has a right to be present and to report upon a public proceeding, but I do not believe that that right is absolute and that that right is paramount, the public's right to know is paramount, to other competing rights of privacy of other members of the [26] public as well as the defendant's to a fair trial.

I think the decision is attempted to weigh those out and for that reason I have elected to seal the questionnaires after a person is seated or respond to those questions. I am sealing them for further review for content by the Court of Appeal, if that is necessary, and I'm also sealing them to maintain as best as possible the anonymity of the public jurors in this particular case.

It doesn't seem to me to accomplish a great deal to have a questionnaire that doesn't contain specific or confidential information or anything that would necessarily identify a particular juror and then have that juror come in and be questioned about the circumstances of that

questionnaire in the presence of people in the media who have that questionnaire who can identify who that particular juror is.

And I think that in light of the confidentiality statute with regard to criminal juries and in light of the fact that there has to be an overwhelming prima facie case made to provide for the disclosure of that information, even the defendant is not entitled to that information per se or the disclosure of any of that information relating to addresses, phone numbers or anything else. The defendant doesn't even have access to that information, Mr. Martin, and I think that's the [27] intent of the Legislature in trying to emphasize the need for jury privacy.

In any event, I intend to stand by that ruling. I will review these cases. If I feel that a modification of my ruling is necessary in light of this, at this point I do not, but I will review the cases again and give an indication. But in the meantime, I intend to comply with my ruling.

MR. MARTIN: Your Honor, just one clarification. Is it also your ruling that the media does not have a right to the actual questionnaire that is not filled out, just the questions?

THE COURT: I intend to disclose the actual questionnaire or have no intention of keeping it confidential or privileged after the selection of the jury.

My concern is that when people are given that questionnaire, that it has not been published in the media or they have not reviewed selective portions of the questions ahead of time so that the answers are honest, spontaneous and give us a fair depiction of what their immediate response is or immediate gut reaction to the question is. That's part of selecting a jury.

Sometimes when you use a questionnaire, you don't always get to observe the demeanor, but sometimes the manner in which they answer the [28] question is indicative of some bias or prejudice. And as you know, Mr. Martin, having picked many juries, it's not often what the person says, sometimes it's how they say it.

MR. MARTIN: One of the issues, however, should we choose to attempt a writ or whatever to clarify the January 1st, 1996 statute with the cases that have been published without the unanswered question or the questions makes it most difficult to argue to the Fifth District whether the questions or certain of the questions in the questionnaire meet the requirements of the new law.

THE COURT: I'll do this for you, Mr. Martin. I will have the clerk mark as a sealed exhibit part one and part two of the questionnaire in its form and I will order that sealed and if the Fifth District is willing to hear this or petition in any manner and they wish to order that exhibit, they may order that exhibit up and it will be sent up to them and provided for them.

MR. MARTIN: Thank you, your Honor.

THE COURT: We are going to take a ten-minute recess, counsel.

(Recess taken.)

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

The full text of the First Amendment to the Constitution of the United States reads as follows:

> **Religious and political freedom.**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The full text of the Sixth Amendment to the Constitution of the United States reads as follows:

> **Rights of the accused.**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The full text of California Code of Civil Procedure section 237 reads as follows:

> **Access to juror information; sealed records; violations.**
>
> (a)(1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information, including names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order see forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.

(c) If a hearing is set pursuant to subdivision (b), the petitioner shall provide notice of the petition and the time and place of the hearing at least 15 days prior to the date of the hearing to the parties in the criminal action. The court shall provide notice to each affected former juror by personal service or by first-class mail, addressed to the last known address of the former juror as shown in the records of the court. In a capital case, the petitioner shall also serve notice on the Attorney General. Any affected former juror may appear in person, in writing, by telephone, or by counsel to protest the granting of the petition. A former juror who wishes to appear at the hearing to oppose the unsealing of the

personal juror identifying information may request the court to close the hearing in order to protect the former juror's anonymity.

(d) After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner. The court shall set forth reasons and make express findings to support the granting or denying of the petition to disclose. The court may require the person to whom disclosure is made, or his or her agent or employee, to agree not to divulge jurors' identities or identifying information to others; the court may otherwise limit disclosure in any manner it deems appropriate.

(e) Any court employee who has legal access to juror information sealed under subdivision (a), who knowingly and in violation of a court order issued pursuant to subdivision (a), discloses the information shall be guilty of a misdeameanor.

(f) Any person who intentionally solicits another to unlawfully access or disclose juror information contained in records sealed under subdivision (a), knowing that the records have been sealed, or who knowing that the information was unlawfully secured, intentionally discloses it to another person shall be guilty of a misdemeanor.